

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 11-00573-1 JSW

Plaintiff,

**AMENDED ORDER GRANTING
GOVERNMENT'S MOTION FOR
REVOCATION OF MAGISTRATE
JUDGE'S RELEASE ORDER**

v.

WALTER LIEW,

Defendant.

This matter comes before the Court upon consideration of the Government's motion to revoke Magistrate Judge Cousins' order, dated February 22, 2013, granting the motion for pretrial release filed by Defendant Walter Liew ("Mr. Liew") (the "Release Order"). The Court has considered the parties' papers, including the Government's reply, relevant legal authority, the record in this case, and has had the benefit of oral argument. The Court also has considered Mr. Liew's *ex parte* submission, dated February 15, 2013, which Magistrate Judge Cousins reviewed *in camera*. For the reasons set forth herein, the Court HEREBY GRANTS the Government's motion.¹

BACKGROUND

The parties have set forth relevant facts in their briefs. Magistrate Judge Cousins set forth the procedural history relevant to Mr. Liew's detention in the Release Order. The Court shall not repeat the facts and procedural history, except as necessary to its analysis. In sum, Mr. Liew has been detained since July 28, 2011, on the basis that the Government had shown by a

¹ The Court issues this Order to amend page 3 line 19 of the Order dated March 20, 2013, in which the Court inadvertently omitted the word "not."

1 preponderance of the evidence that Mr. Liew was a flight risk and no condition or combination
2 of conditions would reasonably assure Mr. Liew's appearance as required. (*See, e.g.*, Docket
3 Nos. 19, 74.)

4 On February 26, 2013, Magistrate Judge Cousins determined that Mr. Liew is eligible
5 for pretrial release. (Docket No. 255 ("Release Order").) Judge Cousins noted that many of the
6 bail factors have not changed since February 28, 2012, when he ruled on Mr. Liew's previous
7 motion for pretrial release. (Release Order at 3:18-19.) The two primary changes are that Mr.
8 Liew offered to increase the amount of the monetary bond from \$200,000 to \$2,000,000, and
9 that he has been in custody for approximately 19 months, and "further detention points strongly
10 to a denial of Mr. Liew's due process rights," because the Government contemplated bringing
11 additional charges, discovery is not complete, and this Court has not set a trial date. (*Id.* at 4:6-
12 25.)

13 During the time the parties were briefing this motion, the Grand Jury returned, and the
14 Government filed the promised Second Superseding Indictment. (Docket No. 269.) As a result,
15 Mr. Liew now faces the following additional charges: (1) five counts of filing false tax returns,
16 in violation of 26 U.S.C. section 7206(1); (2) two counts of making false statements in
17 bankruptcy proceedings, in violation of 18 U.S.C. section 152(3); and (3) one count of making a
18 false oath in bankruptcy proceedings, in violation of 18 U.S.C. section 152(2).

19 ANALYSIS

20 "If a person is ordered released by a magistrate judge, ... the attorney for the
21 Government may file, with the court having original jurisdiction over the offense, a motion for
22 revocation of the order or amendment of the conditions of release[.]" 18 U.S.C. § 3145(a).
23 This Court review's the Magistrate Judge's decision under a *de novo* standard of review.
24 *United States v. Koenig*, 912 F.2d 1190, 1192 (9th Cir. 1990). Under the *de novo* standard of
25 review, this Court "should review the evidence before the magistrate and make its own
26 independent determination whether the magistrate's findings are correct, with no deference. If
27 the performance of that function makes it necessary or desirable for the district judge to hold
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1 additional evidentiary hearings, it may do so, and its power to do so is not limited to occasions
2 when evidence is offered that was not presented to the magistrate.” *Koenig*, 912 F.2d at 1193.

3 Under Section 3142, in a case, such as this, where the Government argues that a
4 defendant is a serious risk of flight, a court must hold a hearing to determine “whether any
5 condition or combination of conditions set forth in subsection (c) of this section will reasonably
6 assure the appearance of such person as required....” 18 U.S.C. § 3142(f); *see also* 18 U.S.C. §
7 3142(c)(1)(B). At such a hearing, a court considers the available information concerning: (1)
8 the nature and circumstances of the charged offense; (2) the weight of the evidence; (3) the
9 history and characteristics of the defendant; and (4) the nature and seriousness of the danger to
10 any person or the community that would be posed by release. 18 U.S.C. § 3142(g).

11 As the Court stated on the record, the Court finds Judge Cousins’ analysis of the factors
12 set forth in 3142(g), as set forth at pages 5 through 6 of the Release Order, is well reasoned.
13 Although the Grand Jury returned the Second Superseding Indictment, which charges Mr. Liew
14 with additional offenses, that fact would not alter the Court’s analysis of the Section 3142(g)
15 factors.²

16 The Court also shares Judge Cousins’ concerns about the due process implications of
17 continued detention. *See United States v. Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988); *United*
18 *States v. Ailemen*, 165 F.R.D. 571, 577 (N.D. Cal. 1996). However, this Court previously
19 designated this matter as a complex case. (*See, e.g.*, Docket No. 45.) The Court also cannot
20 find that the Government is entirely responsible for the delays in this case. Ultimately,
21 however, at this stage of the proceedings, the due process argument is not one that would
22 convince this Court that release would be appropriate.

23 Pursuant to the Government’s request, Judge Cousins inquired into the source of the
24 proposed \$2,000,000 cash bond. *See* 18 U.S.C. § 3142(g); *United States v. Nebbia*, 357 F.2d
25 303 (2d Cir. 1966). This Court has now reviewed the *ex parte* submission. As a preliminary
26 matter, although the Government has presented facts that raise concerns about Mr. Liew’s
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28 ² The Court fully agrees with Judge Cousins’ determination that a private
security guard is not appropriate.

1 credibility, the *ex parte* submission contains statements that reflect a serious measure of candor
2 about the topics discussed. Unfortunately, that candor does not convince the Court that there is
3 a sufficient basis from which it can conclude the source of the bond is such that the \$2,000,000,
4 in conjunction with other conditions, will reasonably assure Mr. Liew's appearance at trial.

5 By way of example only, and without disclosing the substance of the materials that were
6 submitted for *ex parte* review, there is insufficient information from which the Court could
7 determine the value of the property located outside the United States, from which the
8 \$2,000,000 would be derived. In addition, much of the information presented is based upon
9 information and belief, and Mr. Liew does not provide a satisfactory explanation of why he
10 would not be able to establish personal knowledge of the facts discussed.

11 Therefore, on this record, this Court is not satisfied the source of the \$2,000,000 bond
12 will reasonably assure Mr. Liew's appearance at trial. Accordingly, the Court GRANTS the
13 Government's motion to revoke the Release Order. As this case progresses, the Court's ruling
14 should not be construed to preclude Mr. Liew from filing a further motion for pretrial release.

15 In addition, in light of the Court's ruling, it shall not require that the *ex parte* submission
16 be provided in whole or in part to the Government. As the Court stated on the record at the
17 hearing, it cannot say that Judge Cousins erred by permitting Mr. Liew to submit materials *ex*
18 *parte* for an *in camera* review. However, if Mr. Liew renews his motion for pretrial release,
19 and if there are questions about the source of the funds or property for any proposed bond, the
20 Court expects the parties to provide a more robust legal argument about: (1) the propriety of
21 maintaining all such documents under seal; and (2) whether other remedies could sufficiently
22 protect Mr. Liew's Fifth Amendment rights, to the extent those rights actually are implicated by
23 such a submission.

24 **IT IS SO ORDERED.**

25 Dated: March 21, 2013

26 
27 JEFFREY S. WHITE
28 UNITED STATES DISTRICT JUDGE